In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-100

J. O. JOHNSON, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 24, 1969, petitioner made final payment of its accumulated earnings tax for 1965, which had been assessed under Section 531 of the Internal Revenue Code of 1954, 26 U.S.C. 531, in February 1969. On November 29, 1971, more than two years after the date of final payment, petitioner filed a claim for refund of that tax. The Internal Revenue Service took no formal action upon that claim. On August 7, 1972, petitioner brought suit in the United States Court of Claims for refund of the accumulated earnings tax.[1] Since petitioner's refund claim had been filed more than two years after payment of the tax, the court dismissed petitioner's suit as barred by Section 6511(a) of the Code (Pet. App. A).

[1] Petitioner also sued for recovery of the interest paid on that tax for the period between the date of filing its 1965 corporate income tax return and the date of the formal notice of deficiency. Petitioner's claim for refund of that interest had been timely filed in 1970, and that interest has now been refunded pursuant to *Motor Fuel Carriers, Inc.* v. *United States*, 420 F. 2d 702 (Ct. Cl.).

Petitioner here renews its contention that Section 6511, the basic statute of limitations for federal tax refund claims, does not apply to taxes, such as the accumulated earnings tax, which are not self-assessed and with respect to which a taxpayer is not required to file a return. The court below properly rejected this contention in an opinion (Pet. App. A) on which we rely.

As petitioner apparently acknowledges, there is no conflict between the court below and any court of appeals on the issue of the scope of Section 6511. In suggesting that the decision below conflicts in principle with decisions involving entirely different questions, petitioner argues simply that the court below erroneously failed to resolve an alleged statutory ambiguity in favor of taxpayers. Resolution of ambiguity in the favor of taxpayers is not the pre-eminent canon of construction for taxing statutes, however. The function of any court confronted by possibly ambiguous language in a taxing statute is to determine the legislative purpose by considering that language in the context of the statutory scheme as a whole (see, *e.g.*, *White* v. *United States*, 305 U.S. 281, 292), and the court below properly performed that function.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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